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A Rational Choice Theory  
of the Supreme Court

*Rafael Gely*  
*Pablo T. Spiller*

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WORKING PAPER SERIES ON THE POLITICAL ECONOMY OF INSTITUTIONS NO. 27

A Rational Choice Theory of the Supreme Court

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## A RATIONAL CHOICE THEORY OF THE SUPREME COURT

by

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**Abstract:** This paper models the Supreme Court as a self interested party in a bargaining game between the Supreme Court, the two houses of Congress and the President. We analyze the political incentives for the Supreme Court to intervene in the legislative process. We show that the Court will usually intervene following important personnel changes in the composition of Congress and/or the executive. We also show that the Supreme Court does not necessarily increase the stability of political outcomes. Depending on the nature of the political changes, the Supreme Court may delay or accelerate the adoption of new policies. Finally, this model suggests that the Supreme Court constrains more the President than Congress.

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## I. Introduction.

The Supreme Court's ultimate right to interpret the Constitution and to review both federal and state legislation, provides it with a central role in the implementation, development and enforcement of public policy. Because of its importance, the Supreme Court has attracted much scholarly attention, both normative,<sup>1</sup> and positive.<sup>2</sup> The current academic and public debate about the role the Supreme Court should play in our political system, however, has taken place without an analytical treatment of the basic premises to the debate. In particular, the performance characteristics of an "activist" court remains to be developed in the framework of an institutional theory of the Supreme Court.

In this paper we start such a study by taking a different approach from previous analyses of the Supreme Court. Rather than developing a normative theory of the Supreme Court devoid of political content, we provide, instead, a "self-interest" theory of the Supreme Court. We see the Supreme Court, here, as an ideologically motivated political body with well defined political preferences. An institution that can determine public policy, subject not to the traditional legal rules of precedent, but to the constraints imposed by the other political institutions (i.e. Congress and

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<sup>1</sup> There has been a long-standing debate about whether the Court must follow an "activist" or "restrained" path. See, for example, Forte (1972), Halpern and Lamb (1982).

<sup>2</sup> There have been recent surveys of the different approaches to the analysis of the Supreme Court (see Rohde and Spaeth (1976), Sheldon (1974), Halpern and Lamb (1982) and Wasby (1988)). Among the classic positive approaches to the Supreme Court is that of Dahl (1957), who claims that, because of their recruitment, the Justices are a reflection of the electorate, and they play a "legitimizing" role. Dahl's hypothesis is rooted in the "decision-making" models of the Court (see Sheldon (1974)), where, as long as its composition is given, the Court is essentially independent of the remaining parts of the political system. Dahl's hypothesis was later expanded by Funston (1975). See also Handberg and Hill (1980) and (1984) for a similar interpretation. An alternative view of the Supreme Court is provided in Adamany (1973), who claims that the Court constitute a force for instability. See, also Casper (1976).

the Presidency). In other words, we model the Supreme Court in such a way as to resemble in many respects, the description of the "activist" court.

While we do not claim this to be an accurate description of the actual workings of the Supreme Court, it provides a simple positive framework that is rich enough to analyze, and forecast, changes over time in the behavior of the Court. Furthermore, many of the implications of the model are not only consistent with much of the current political wisdom on the role of the different political institutions, but are empirically refutable.

While we argue in this paper that, as Congressmen and the President, the behavior of the Court can be understood as that of a self-interested political actor, the Justices' calculus differ from those of Congressmen. Unlike Congressmen, the Court does not necessarily have a relevant constituency whose interests it needs to consider in rendering its opinions.<sup>3</sup> On the other hand, the Supreme Court decisions are not taken in a political vacuum. The ability of other political actors to take actions to reverse the Supreme Court decisions is what constraints the scope and power of the Court.

Although broad, the power of the Court is not unfettered. There are constitutional limits.<sup>4</sup> Equally important, and those we focus on here, are the constraints on the Court's interpretation of statutes or constitutional decisions<sup>5</sup> that

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<sup>3</sup> Unlike members of Congress, or the President, who are directly elected in popular elections, the Supreme Court justices are not subject to the direct impact of electoral forces. Furthermore, interest groups do not have the same direct impact in the Court as they have in Congress. Their role in the judicial process is limited to their participation as litigants in cases where they might be directly involved, or, to the filing of "amicus briefs" in cases in which they might have interests at stake.

<sup>4</sup> For constitutional analyses of the Supreme Court, see, for example, Nowak, et. al. (1983), and Wasby (1988).

<sup>5</sup> The empirical importance of considering both types of issues (i.e. statutory and constitutional) is shown in Casper (1976), where Dahl's (1974) conclusions are reversed simply by considering both types of cases.

result from the institutional structure of government. Consider, for example, legislative enactment. Congress, with or without the consent of the executive, can react to Court decisions it dislikes by taking several actions.<sup>6</sup> Congress could directly reverse the Court's interpretation of a statute by enacting legislation to that regard.<sup>7</sup> A constitutional amendment,<sup>8</sup> or a change in the Court's jurisdiction<sup>9</sup> or composition<sup>10</sup> are other alternative ways for Congress to influence the Court. More indirectly, Congress could "punish" the Court by limiting budgetary support for the judiciary.<sup>11</sup> Similarly, Congressional jurisdictional rules, the committee system, bicameralism, the President's veto power, are all important institutional features that will impact on the nature and extent of the constraints faced by the Court.<sup>12</sup>

The model of the Supreme Court that we introduce below is very simple. We abstract from most of the rich institutional and personal issues that have

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<sup>6</sup> See Stumpf (1965, p. 393) for a detail of the types of actions Congress may take when disagreeing with a Supreme Court decision. See also Wasby (1988) who adds other possibilities. Of particular importance, is the refusal by Congress to provide the compensation required by the Court (e.g. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), where the Court found that a state legislature could not rescind grants of land to original purchasers. See also Nowak (1983) for a discussion of this case).

<sup>7</sup> For analyses of Congressional reversal of Supreme Court decisions see, for example, Note: "Congressional Reversal of Supreme Court Decision: 1945-1957," Harvard Law Review (1958, pp:1324-1337); Stumpf, (1965); and Henschen, (1983).

<sup>8</sup> Wasby (1988, p. 307), points that the "Eleventh, Sixteenth, and Twenty-sixth Amendments, as well as the post-Civil War amendments on slavery and the status of blacks -- all initiated by Congress-- were passed to override Court decisions."

<sup>9</sup> See Stumpf (1975).

<sup>10</sup> See Lawlor (1986), and Caldeira (1987) for discussions of bills introduced in Congress to change the Court's composition.

<sup>11</sup> Schmidhauser and Berg (1972, pp. 8-18) discuss the significance of Congress' budgetary responses to Supreme Court decisions. See also Wasby (1988, p.300).

<sup>12</sup> Although some of these institutional arrangements have been studied within the congressional context (Shepsle and Weingast (1982), Weingast and Moran (1983)), few attempts have been made to analyze their effects on Supreme Court decisions. See, however, Marks (1987), who analyzes the effect of the Supreme Court on Congress' decisions



characterized the two centuries of Supreme Court history. Instead we develop a stripped-down model of bargaining among our four political players: the House, the Senate, the President and the Supreme Court, each with its own preferences. The role of the Supreme Court is to determine the reversal policy point that will take effect if the houses of Congress do not reach an alternative agreement. That is, the Supreme Court determines actual policy insofar as Congress does not reverse it.

While simple, our framework has several implications that could, in principle, be subject to empirical testing. First, it suggests that the Supreme Court performs a role similar to that of institutional arrangements in structure-induced equilibria models.<sup>13</sup> The Supreme Court affects the stability of legislative outcomes in a variety of ways. The Court, by its choice of cases, may assume the role of "agenda setter,"<sup>14</sup> increasing or decreasing the extent of policy stability. One way the Court increases policy stability is by substantially reducing the power of the President. In particular, in the absence of veto power, the President's main policy impact is achieved through appointments to the Court. Even when the President can sustain a veto, its power is substantially reduced by the Supreme Court. In this case, however, the President's preferences impact upon the determination of public policy. On the other hand, even without changes in its composition, the Supreme Court may actually increase the extent of policy change following a change in the electorate. For example, when an electoral result does not change both houses of Congress in the same way, an opportunity arises for the Supreme Court to intervene by aligning itself with

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<sup>13</sup> See, for example, Shepsle (1979) and Denzau and Mackay (1981).

<sup>14</sup> That is, the Supreme Court could devise a series of decisions leading to a final outcome coinciding with its (constrained) best policy outcome. Furthermore, The Court has the authority to accelerate or delay the consideration of certain cases that are brought to its attention. We refer here not only to rules of procedure, but also to certiorari and dismissals decisions, and to Constitutional rulings on issues such as separation of power.

either the Senate or the House. In general, our model suggests that, even without changes in its composition, the Supreme Court will follow the voters' preferences as translated in Congressional and Presidential changes.<sup>15</sup>

Second, the Court will act strategically when intervening in public decision making.<sup>16</sup> Under some circumstances the Court will not interfere with Congress, while it will under a different set of circumstances.<sup>17</sup> The Court, for example, will be more likely to intervene in situations where Congress is internally divided over the issue in question, and thus take a more "activist" role. In situations where both the House and the Senate have similar preferences, the Court will not intervene,<sup>18</sup> and hence will follow a "restrained" path. Otherwise, a new bill will be introduced, overturning the Court's decision.

Third, we show, that, even without changes in its composition, the Court is responsive to the changes in the electorate, or to the composition of interest

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<sup>15</sup> This result is similar to that advocated by many political and legal scholars (e.g. Funston (1975), Handberg and Hill (1984)). We differ, however, in providing a micro-analytic foundation to that claim.

<sup>16</sup> The strategic behavior of the Court can take different dimensions. The Court can not only decide whether or not to intervene (Wasby (1988), Casper (1976), Handberg and Hill (1980, 1984)), but it may decide on several forms of intervention. It can decide, for example, whether to deal with the case as a question of constitutional law, or as a matter of statutory interpretation. See Nowak, et. al (1983 p. 92), suggesting that the Court should avoid constitutional decisions. Also, when interpreting statutes, the Court can follow several strategies (Wasby (1988, p.306)). It may explicitly suggest to Congress what to do to make a statute valid, or it may engage in a "trap pass," by interpreting a statute so rigidly that it looks ridiculous, with the expectation that Congress then will change the law.

<sup>17</sup> It is usually claimed, for example, that, so as to retain its political capital, the Court will strategically retreat from politically untenable positions. See for example, Nagel (1969), Adamany (1973) and Funston (1975).

<sup>18</sup> See Marks (1987) for a related analysis.

groups.<sup>19</sup> The impact of the electorate or of the interest groups, however, is indirect, and it is effected through changes in the composition of Congress and in the Presidency. Thus, this model of the Supreme Court, which in principle resembles an activist court, predicts that the Supreme Court will play different roles depending on the composition of (and changes in) Congress. The Supreme Court, though, whether "restrained" or "activist," will usually follow electoral changes. In either case, however, the Supreme Court will not be "dictatorial." An "activist" Court is nothing more than a Court siding with one of the houses of Congress, or with the President.

Finally, we show that the Court restrains more the President than Congress. The Court, however, will tend to benefit from the independence of the executive, and thus our framework predicts that, purely from self-interest reasons, the Court will tend to uphold the constitutional separation of powers.

The paper is organized as follows. In Section II we present a simple model of Supreme Court decisions when facing only both houses of Congress. In Section III we expand the model to consider the role of the President. We conclude the paper with suggestions for further research in Section IV.

## II. A Simple Model of the Supreme Court-Congress Relationship.

In this section a simple model of the Supreme Court-Congress relationship is developed. We focus here on statutory rather than Constitutional issues. Elsewhere we expand this framework to the analysis of Constitutional interpretations.<sup>20</sup> The institutional actors are the Senate, S, the House, H, and the Court, SC. A policy

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<sup>19</sup> Previous positive political analyses of the Supreme Court (see footnote 2) have focused, almost exclusively, on the impact of "realigning elections" on Supreme Court decisions, suggesting that those are the times when the Court and Congress will disagree. See for example Handberg and Hill's (1984) and Adamany (1973). Our result, however, is different. Various degrees of changes in the political system, not only drastic electoral results, may open opportunities for the Court to become more "active," and to affect the status quo.

<sup>20</sup> Gely and Spiller (1989a).

outcome is defined as a vector  $x \in R^2$ , where each dimension represents different policies or aspects of a certain policy dispute.

Our first set of assumptions concerns preferences. We start by assuming that the Supreme Court and both houses of Congress have well defined and stable preferences over the policy space ( $R^2$ ) represented by strictly convex indifference curves.<sup>21,22</sup> Let H, S, and SC represent the ideal policy points of the House, the Senate and the Supreme Court.

Given those preferences, we can define a contract curve in the policy space between the House and the Senate. A point is on the contract curve if a deviation from that point implies a reduction in the utility level of at least one of the players. Thus, it represents all those points in the policy space that the players could reach if they would bargain in isolation. Let the contract curve between the House and the Senate be  $C(H,S)$ .

Our second assumption concerns the bargaining structure and the role of the Supreme Court. We assume that the role of Supreme Court's decisions is to determine the policy reversal point that would take effect absent an alternative agreement by both houses of Congress. A choice of a reversal point outside the contract curve between the House and the Senate ( $C(H,S)$ ), implies that the House and the Senate can bargain for a policy point that will make both better off. On the other hand, a

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<sup>21</sup> Although the institutional actors included in the model are groups of individuals which we expect to have different preferences, we can define an ideal point for each actor based on the majority's preference, as in the Supreme Court, or by the preferences of the chairman or of the committee with jurisdiction over the subject matter. Thus we assume that the decisions of each of the three collective actors can be represented as a choice made by a single individual.

<sup>22</sup> While members of the Court are not elected and thus are not under direct constituency pressure, they are appointed by elected officials who do feel that pressure. Further, political considerations form part of the appointment process, making it important to consider the political preferences of the justices. Thus, it is reasonable to assume that, in the absence of changes in its composition, the Supreme Court has stable preferences over the policy space.



choice of a reversal point on the contract curve implies that Congress will take no further action, and that the reversal point will become the new policy outcome.

### Long Run Political Equilibria

With the above set of preferences and the bargaining structure, we can describe the set of "feasible legislative outcomes." A feasible legislative, or political outcome is one such that no other outcome would make both the Senate and the House better off. Thus, in this case, the set of feasible legislative outcomes is the contract curve between the House and the Senate.

From that set, a "long run political equilibrium" will develop. We claim that a long run political equilibrium is a feasible legislative outcome (i.e., it is in  $C(H,S)$ ) such that no alternative policy can make the Supreme Court better off. Formally,  $X^*$  is a long run equilibrium if  $X^* \in \{X/X = \text{Arg Max } U^{sc}(x), \text{ s.t. } x \in C(H,S)\}$ , where  $U^{sc}(x)$  represents the utility function of the Supreme Court.

A political long run equilibrium has to be in the contract curve of the House and the Senate. To see that, consider a point outside the contract curve. The House and the Senate can agree on a point on the contract curve that will make them better off. Consider, now a case where the status quo is on the contract curve but the Supreme Court could be made better off by an alternative policy closer to, say, the ideal point of the House. Then, the Supreme Court by properly selecting a series of cases can change the reversal point so that bargaining between the House and the Senate brings the Court's most preferred point on the contract curve as the legislative policy outcome. Thus, in a long run political equilibrium no point on the contract curve can make the Supreme Court better off.

At that point the political process ends. First, bargaining among the House and the Senate cannot make both houses better off. Second, further action by the Supreme Court implying a reversal point outside the contract curve will trigger renewed

bargaining implying a legislative outcome again on the contract curve.<sup>23</sup>

Figure 1 presents the basic structure of the model.  $E_2$ , is a long run equilibrium since no other feasible legislative alternative, given the actors' ideal points, makes the Supreme Court better off. Furthermore, the House and the Senate have no motivation to change the status quo.

The concept of long run political equilibria helps to distinguish the different ways the Court affects legislative outcomes. On the one hand, in some situations the Court will intervene in a Congressional dispute in order to create a bargaining area where the House and Senate can negotiate. In others, it will intervene to change (or reverse) a legislative decision. Such intervention by the Court may bring about, by itself, a long run equilibrium.

Consider, for example, the sequence of events which may evolve in the relationship between Congress and the judiciary. Begin, first, with a particular status quo, ( $E_1$ ), as in Figure 1. The status quo could represent either an issue on which the Congress has not yet acted, as was, for example in Gilligan, et al. (1986), the regulation of railroad rates by state authorities prior to the enactment of the Interstate Commerce Act, or an issue on which Congress has acted and reached an agreement. Second, a legal dispute arises over the policy in question and it is brought before the judiciary. The Court announces its ruling,  $R_1$  in Figure 1. The intervention of the Court has two implications. First, it should be noted that the

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<sup>23</sup> If the Supreme Court would try to impose its ideal point SC as the policy outcome, it will face a reversal by Congress. If the Supreme Court tries, after being reversed, to again impose its ideal point as the policy outcome, a constitutional conflict will develop. Both houses of Congress could then support a constitutional amendment to either overrule the Supreme Court, or to further limit its power. Observe, however, that if the Supreme Court's decision changes the status-quo from one point to another, both in the contract curve, no constitutional conflict would arise since one house of Congress is necessarily made better off by the Supreme Court move. See Wasby (1988) and Casper (1976) for discussions of the constitutional implications of a "ruling-response-ruling-response" sequence.

Court is able to interfere because it can find a point closer to its ideal point such that either the House or the Senate weakly prefers it to the status quo. In this example the Senate is indifferent between that point,  $R_1$ , and the status quo,  $E_1$ , since both lie on the same utility curve.  $R_1$ , however, is not a long run equilibrium as defined above, since  $R_1 \notin C(H_1, S_1)$ . Instead,  $R_1$  is better understood as a short run equilibrium that can easily be upset by congressional action. By interfering through  $R_1$ , the Court is in effect "taking away" from the committees with jurisdiction over the matter the agenda power, and opening new bargaining possibilities for Congress. Following the Court's ruling, there will be some sort of congressional action within the bargaining area. At the end of this bargaining process there will be a new long run equilibrium point,  $E_2$ , ensuring no further intervention by either Congress or the Court.

Although the Court forces Congress to agree to a new policy outcome, such an outcome is in the set of otherwise feasible alternatives. Further, the Court's intervention is far from "tyrannical." It clearly makes at least one of the parties better off.<sup>24</sup>

#### Comparative Statics

The model just described can be used to understand changes in the position of the Supreme Court, even in the absence of changes in its composition. Consider, for example, an initial long run equilibrium,  $E_1$ , where the House and the Senate are as depicted in Figure 2. Let there now the results of an election imply a large change in the composition of the House, so that it would now like to see, say, a stricter enforcement of federal regulations. Since the Senate has not changed, any new legislative equilibrium (in the absence of any Supreme Court ruling), should reside in

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<sup>24</sup> That would not have been the case if the Court would insist on a position such as  $R_1$  as the final outcome.

the intersection of new contract curve between the House and the Senate ( $C(H_2, S_1)$ ) and the bargaining area defined by  $E_1$ . The fact that the Senate did not change restricts the extent of policy change that can develop. Figure 2 shows, for example, that the new long run equilibrium may well be outside that area. Figure 2 depicts the fact that the new long run equilibrium,  $E_2$ , will usually move towards the new ideal point of the House (that is, there will be a stricter enforcement of regulations). Thus, the Supreme Court will usually follow the voters. This is however, a qualified statement. Proposition 1, below, presents the conditions under which the Supreme Court follows the electorate.

Proposition 1: Assume that a) preferences of the House, the Senate and the Supreme Court are represented by circular indifference curves in  $R^2$ ; b) the initial equilibrium is in the interior of the contract curve; then moves in the electorate where either only one house moves or both houses move in the same direction will imply changes in the long run equilibrium which will follow the electorate, unless the change is in only one house, and the dimension that changes is a) one which separates the most the House from the Senate, and b) the initial status quo implied a larger equilibrium value for that dimension than that of the ideal point of the Supreme Court.

Proposition 1, proved in the Appendix, shows<sup>25</sup> that the Supreme Court does not follow the electoral results only when a) the electoral change implies a shift in, say, the House's ideal point along a dimension over which the House and the Senate were already far apart, and, b) the initial equilibrium value of that dimension exceeded the value for the ideal point of the Supreme Court.<sup>26</sup> Otherwise, the Supreme Court follows the electorate.

### III. The Role of the President.

The model discussed above can be expanded to account for the role of the executive.

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<sup>25</sup> The Proposition assumes circular preferences, a common assumption in spatial political models.

<sup>26</sup> The first condition relates to the steepness of the contract curve, while the second condition relates to the position of the Supreme Court's ideal point in relation to the initial contract curve.



The President has several means to affect congressional acts with which he may disagree.<sup>27</sup> An obvious way is the exercise of the power to veto. By exercising the veto the President can upset the dynamics of Congress and may cause a legislative outcome. Another way to influence the policy-making process is by making appointments to the Supreme Court.<sup>28</sup> In this sense the President may try to "pack" the Court. Alternatively, the President may change policy through its power over the agencies and departments in charge of enforcing the law.<sup>29</sup> By changing guidelines, and/or key personnel in an agency, the President can significantly alter the way the written law is enforced.

In this section we show, that, in the presence of the Supreme Court and without the power to sustain a veto, the only policy power left to the President is to appoint Justices to the Supreme Court. The ability to sustain a veto, however, makes Presidential preferences matter in determining the long run political equilibrium.

We start by assuming that the President also has strictly convex preferences in  $R^2$ , and call  $P$  its ideal policy point. The introduction of the President implies changes to the set of feasible and long run political equilibria. We analyze those changes by a series of exercises. We first assume that the President has only executive powers, and analyze how the introduction of the Supreme Court changes the nature of the long run equilibrium. We then introduce the power to veto, and analyze the resulting equilibria with and without the Supreme Court.

#### Presidential Power without Veto Power

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<sup>27</sup> On the President-Court interaction, see Wasby (1988, p. 313) and references therein.

<sup>28</sup> On Roosevelt's Court Packing Plan, see Gely and Spiller (1989a) and references therein.

<sup>29</sup> On the Court-agencies interaction, see, for example, Garland (1985), Fix and Eads (1985), Scalia (1986), Thomas, Wildemann, and Brown (1987).

We start by assuming that the President does not have the ability to veto Congressional actions. The main power of the President, then, is its executive power, namely its ability to implement policies through the administrative agencies. The President, though, is subject to being overruled by both Congress and the Courts.

Consider, then, a simple bargaining game among the House, the Senate and the President, where the President cannot sustain a veto. Let us first define the set of feasible political equilibria in the absence of veto power. As defined above, a feasible political equilibrium is a feasible bargaining outcome. Since any point in the House-Senate contract curve ( $C(H,S)$ ) is preferred by both the House and the Senate to any point outside it, the President, without veto power, cannot administratively implement any policy outside  $C(H,S)$ . Thus, as in the case without the President, feasible political equilibria are only those points in  $C(H,S)$ . While the President is not able to sustain a veto, it may play a substantial role in determining the equilibrium outcome in the absence of Supreme Court scrutiny. Consider, as in Figure 3, an initial legislative equilibrium in  $C(H,S)$ , say, point  $E_1$ . Among the set of feasible equilibria, the President would prefer point  $E_2 \neq E_1$ . It can administratively achieve  $E_2$ . Observe that if an executive agency carries on a policy characterized by  $E_2$ , the House is better off than at  $E_1$ , and hence will block any legislation that the Senate will bring to overrule the President.<sup>30</sup> Thus, executive discretion provides the President with substantial power over the determination of legislative outcomes even when it may have no veto power. In the absence of the Supreme Court, then, the long run political equilibrium is characterized by that point

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<sup>30</sup> The agency, however, may still face problems with Congress if the committee that oversees it does not support its policies. While the committee may not be able to force the agency to reverse its policy, it may try to influence the agency through different ways. Budgetary decisions as well as oversight activities may substantially disturb the agency's operations. See Spiller (1988), and references therein.

in  $C(H,S)$  that maximizes the President's utility.<sup>31</sup>

Let us now introduce the Supreme Court. As in the previous section, we model the Supreme Court as providing the policy reversal point that would take effect absent an alternative agreement by the House and the Senate. The introduction of the Supreme Court eliminates the power of the President to influence policy. To see this, consider  $E_2$  in Figure 3. This point, which in the absence of the Supreme Court would represent a long run political equilibrium makes the Supreme Court worse off than point  $E_3$ , which maximizes the utility of the Supreme Court in the set  $C(H,S)$ . If the President tries to implement  $E_2$ , the Supreme Court would rule it illegal. In its decision it will either move directly to  $E_3$ , or to a point from which bargaining between the House and the Senate will bring about the legislative enactment of  $E_3$ . Thus, the introduction of the Supreme Court fully eliminates the ability of the President to influence policy in the short run.<sup>32</sup> That is not to say that the President, without the power to veto, has no influence on long run policy. The fact that the President may appoint Supreme Court justices (subject to Senate confirmation), provides the President with a long lasting effect on policy, even though it may have very small effect on the short run.<sup>33</sup>

#### The Power of the Presidential Veto

Let us now introduce the Presidential veto. Presidential veto power expands the area of feasible legislative outcomes. Since we are modeling the House and the Senate as having well specified preference orderings, we are focusing essentially on the

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<sup>31</sup> Formally,  $^{NS}X^* = \{X/X = \text{Argmax } U^P(x), \text{ s.t. } x \in C(H,S)\}$ , with the superscript  $^{NS}$  representing the absence of the Supreme Court.

<sup>32</sup> For an application of this framework to Supreme Court decisions reversing executive agency's interpretation of the law, see Gely and Spiller (1989b).

<sup>33</sup> It is then not surprising, that current commentators see the appointments to the Supreme Court, more than any of the other domestic policy choices, the main legacy of former President Reagan.

preferences of the relevant committees with jurisdiction over the issues in question. We are, thus, not assuming that all, say, Senators have homogenous preferences. If that would be the case, then, Congress could overrule a Presidential veto. If Congress' preferences reflect only those of the relevant committees, they do not necessarily imply the existence of supermajorities in both houses, and hence, there is a role to the Presidential veto. Thus, to model the ability of the President to veto legislation, we assume that any legislation must have the agreement of all three actors, the House, the Senate and the President. In other words, any new legislation cannot make any of the three actors worse off.

Consequently, all feasible legislative outcomes must reside (weakly) inside the area delineated by the three relevant contract curves  $(C(H,S), C(H,P), C(S,P))$ , see Figure 4). Call the set of feasible legislative outcomes  $W(H,S,P)$ . If the President can convince both the House and the Senate that it will veto any point on the contract curve between the House and the Senate, then the power to veto provides the President with the ability to shift the equilibrium legislative outcome closer to its own ideal point. The outcome of the three sided bargaining game will depend on the relative bargaining positions of the three actors. All we can say is that for a legislative, or administrative, action to constitute an equilibrium it must be in  $W(H,S,P)$ .

The introduction of the Supreme Court allows us to define a "long run political equilibrium." As before, a long run political equilibrium is a feasible political equilibrium such that no alternative policy will make the Supreme Court better off. Formally,  $X^*$  is a long run political equilibrium, if  $X^* \in \{X/X = \text{Argmax } U^{SC}(x), \text{ s.t. } x \in W(H,S,P)\}$ , and it is depicted in Figure 4.

We can then state the following Proposition:

Proposition 2: a) If  $SC \in W(H,S,P)$ , then SC is a long run political equilibrium.

b) If  $SC \notin W(H,S,P)$ , then the long run equilibrium is in the boundary



of  $W(H,S,P)$ .

The first result simply states that if the ideal point of the Supreme Court is located inside the set of feasible equilibria, then through judicial intervention, the Supreme Court will make its ideal point the long run legislative outcome. If, however, SC is outside the set of feasible equilibria, then the long run equilibrium is on a contract curve between any two of the three political actors.

To prove the Proposition, consider first the case where the Supreme Court's ideal point is strictly inside  $W(H,S,P)$ , as  $SC_3$  is in Figure 4. Then by definition, any move away from  $SC_3$  will make at least one of the three political actors worse off, and thus will be vetoed by either the President or one of the houses of Congress. Thus, if the Supreme Court makes a ruling that essentially determines the reversal point to be its own ideal point, it becomes the long run equilibrium.

Consider now the case where the Supreme Court ideal point is outside  $W(H,S,P)$ . Were the Supreme Court to make a decision that falls outside  $W(.)$ , further legislation will follow, since the winning set corresponding to such reversal point is not empty. That is, there is necessarily a point that will make the President, the House and the Senate better off. Thus, a new legislative action will develop, bringing the political equilibrium inside  $W(.)$ . Consider, instead a Supreme Court decision which is at the boundary of  $W(.)$ . Then, no further legislative action can develop. Any movement away from the point reflecting the Supreme Court decision, will make at least one political actor worse off, and hence it will be vetoed. Since the Supreme Court is better off at the boundary of  $W(.)$  than strictly inside  $W(.)$ , the long run equilibrium must be on the boundary of  $W(.)$ , proving the Proposition.

With Proposition 2 we can analyze the power of the veto. There are two cases to consider, one where the Supreme Court decision is on the contract curve between the House and the Senate, and another where the decision is on a contract curve involving

the President. Consider the former case first, represented by  $E_1$  in Figure 4. In such a case, since the Supreme Court decision is on the contract curve between the House and the Senate, the veto power of the President is of no value to the President. The President cannot force a legislative outcome that moves the equilibrium outside of the House-Senate contract curve, since such move would imply that either the House or the Senate or both would be worse off.

Consider now a case where the Supreme Court decision is on a contract curve involving the President and, say, the House, represented by  $E_2$  in Figure 4. The Senate would like to move the legislative outcome strictly inside  $W(\cdot)$ . To do so it has to align necessarily with the House, since aligning itself with the President is not enough to overrule a Supreme Court decision. However any movement away from the contract curve between the House and the President that makes the House better off, necessarily makes the President worse off. Thus, the President will align itself with the Supreme Court and veto Congress' overrule of the Supreme Court decision. The power to veto, however, does not provide the President with the ability to shift the political equilibrium closer to its ideal point. Would the President try to align itself with the Senate through its use of an administrative agency, the Supreme Court will declare the President's action illegal, and the House will veto any intent to overrule the Supreme Court action.

Thus, the power to veto provides some power to the President. In particular, under some conditions it brings the long run equilibrium closer to the Presidential ideal point. This happens insofar as the ideal points of the Supreme Court and of the President are on the same side of the House-Senate contract curve. There are two main cases, first, when the Supreme Court's ideal point is inside  $W(H,S,P)$ . In that case, in the absence of the Presidential veto power, the long run political equilibrium will be on  $C(H,S)$ . With veto power, however, the long run equilibrium is inside  $W(\cdot)$ .

Second, when the ideal point of the Supreme Court is outside  $W(.)$  but on the same side of  $C(H,S)$  as the President ideal point, the long run equilibrium will be on either the House-President or the Senate-President contract curve. Thus, the Presidential veto power implies that the preferences of the President matter in determining the long run political equilibrium.

This is not the case, however, when the ideal points of the President and of the Supreme Court are on different sides of the House-Senate contract curve. In that case, the long run equilibrium is on the House-Senate contract curve, and the preferences of the President are inconsequential to determine the long run equilibrium. In this case, the Supreme Court has made the President totally irrelevant for short run policy determination. The power to veto is not enough to overrule the Supreme Court, and hence the President is not able to bring the equilibrium legislative outcome inside  $W(.)$ .

#### Comparative Statics

Proposition 2, then, can be used to analyze the comparative statics implications of our model. In particular, the model has predictions concerning changes in the long run political equilibrium even in the absence of any change in the position of the Supreme Court.

Consider first, a case where the ideal point of the Supreme Court is inside  $W(.)$ . In that case, marginal changes in the ideal points of the President, the House, or the Senate will have no impact on the legislative equilibrium and on the position of the Supreme Court. (Relatively large changes, however, that take the Supreme Court's ideal point outside  $W(.)$  will have an effect on the legislative equilibrium.)

Let now the ideal points of the President and of the Supreme Court be on different sides of the House-Senate contract curve. In that case, the long run equilibrium is on  $C(H,S)$ , and changes in the position of the President will have no

impact on the legislative equilibrium. Instead, only changes in the position of either the House and the Senate imply a change in the long run political equilibrium.

Consider, now, the case where the initial long run equilibrium is on the contract curve involving the President, and say the House ( $E_1$  in Figure 5). Let the ideal point of the President change, say, away from the ideal point of the Supreme Court. The contract curve between the President and the House moves also away from the Supreme Court. If the Supreme Court does not act to change the status quo, then the initial status quo is outside the new  $W(.)$  set, and a bargaining opportunity arises among the House, the Senate and the President. The new long run equilibrium has to reside on the new contract curve, with the Supreme Court following the electorate (see, however, Proposition 1 above). That is, the long run equilibrium will follow the move in the preferences of the President.

Finally, it is clear from the previous discussion that the Supreme Court benefits from an expanded set of feasible political equilibria. In particular, the Supreme Court benefits from the constitutional separation of powers. Consider, for example, an institutional change reducing the ability of the President to veto legislation. Such change would shrink the set of feasible legislative equilibria ( $W(H,S,P)$ ) towards the contract curve between the House and the Senate. Thus, if the Supreme Court's ideal point is on the same side of  $C(H,S)$  as that of the President, it would be made worse off, and should be expected to declare such institutional arrangement as illegal or unconstitutional. Similarly, any type of Congressional encroachment on executive privileges should also be expected to be reversed by the Supreme Court. While the Supreme Court may use constitutional arguments in its decision, such decision can be predicted purely on self-interest grounds.

#### IV. Final Comments

This paper provides a micro-analytic model of the Supreme Court. Our model, however,



is very simple. We provide, in principle, more power to the Court than most observers will believe it has. We assume, for example, that the Supreme Court can choose points in the policy space, when in fact the Supreme Court may be able only to choose regions of acceptability. Furthermore, the Court may not be able to provide the means to enforce actual levels of expenditure. Also, none of the important differences between different type of cases are considered here. While these are important limitations, we see this paper as an initial attempt at exploring the role of the Supreme Court from a institutional perspective. Further extensions should prove particularly useful. The introduction of informational problems, for example, could provide further strategic explanations for Supreme Court decisions as well as Congressional choices. For example, informational problems should prove particularly useful in understanding case selection, as well as Congressional reversals. These issues are left for further research.

While extremely simple, the model, however, seems to provide implications which are not too different from what several Supreme Court scholars have previously recognized. For example, our "activist" Court follows electoral results; furthermore, while the Supreme Court may be activist in some policy issues it may be restrained in others; finally, the Supreme Court restricts more the executive than the legislative.

While consistent with some conventional wisdom, our model also provides empirical implications, which could, in principle, be refuted. In particular, holding constant the Supreme Court preferences, changes in the preferences of the relevant committees, and of the President, should have an impact on Supreme Court decisions, including the granting of certiorari. Whether the preferences of the President matter, however, depends on both the relative position of the President and the Supreme Court, as well as on how similar are the preferences of the relevant committees to those of their respective houses. This is the focus of current research.

## APPENDIX

Lemma 1: Assume that a) preferences of the House, the Senate and the Supreme Court are represented by circular indifference curves in  $R^2$ ; b) the initial equilibrium is in the interior of the contract curve; and c) the electoral result implies a movement in the same direction of the ideal points of both the House and the Senate. Then, the long run equilibrium moves in the same direction as the ideal points of the House and the Senate, independently of the location of the ideal point of the Supreme Court.

To prove the Lemma, observe that with strict convexity of preferences, the contract curve is either quasi-convex or quasi-concave. Thus, there is a unique long run equilibrium. Second, since both the House and the Senate move in the same direction, the contract curve also moves in the same direction. Thus, the set of all feasible equilibria also moves in the same direction as the House and the Senate's ideal points. Thus, the long run equilibrium also has to move in the same direction.

Lemma 2: Assume a) and b) from Lemma 1; and that c) the electoral result implies a movement only in the ideal point of one of the houses of Congress; d) the movement is only in one dimension, call it  $x_1$ ; and e) the initial equilibrium level of  $x_1$  is below the most preferred point of the Supreme Court, then the new long run equilibrium will follow the move in the electorate. If, however, f) the initial equilibrium level of  $x_1$  exceeds the most preferred point of the Supreme Court, then the new long run equilibrium will follow the move in the electorate only if the initial contract curve implies a relatively low rate of substitution (to be specified below) between  $x_1$  and  $x_2$ .

To prove the Lemma, observe that from a), the contract curve is linear. Thus, in a  $(x_1, x_2)$  plane, the contract curve can be represented by  $x_1 = a + bx_2$ , where  $a = (x_{2S}x_{1H} - x_{1S}x_{2H}) / (x_{2S} - x_{2H})$ , and  $b = (x_{1S} - x_{1H}) / (x_{2S} - x_{2H})$ , with  $x_S$  ( $x_H$ ) representing the ideal point of the Senate (House). If we assume, say, that the House (Senate) has a higher demand for  $x_2$  ( $x_1$ ) than for  $x_1$  ( $x_2$ ), then  $b < 0$ ,  $a > 0$ . Hence, the first order condition for the Supreme Court can be represented by (where  $^{SC}U$  represents the utility function of the Supreme Court):

$$\begin{aligned} & ^{SC}U_1 b + ^{SC}U_2 = 0, \\ \Delta = & ^{SC}U_{11} b^2 + ^{SC}U_{22} < 0. \end{aligned} \tag{A1}$$

Assume, now a movement in the ideal point of the Senate, such that  $dx_{1S} > 0$ ,  $dx_{2S} = 0$ . Then, fully differentiating (A1) we obtain

$$\begin{aligned} \frac{dx_1}{dx_{1S}} &= \frac{2[(-(a' + b'x_2^0) + bb'(x_{10} - x_{1SC}))]}{^{SC}U_{11}b^2 + ^{SC}U_{22}} \\ \frac{dx_2}{dx_{1S}} &= \frac{2[b(a' + b'x_{20}) + b'(x_{10} - x_{1SC})]}{^{SC}U_{11}b^2 + ^{SC}U_{22}}, \end{aligned}$$

where  $a' = \partial a / \partial x_{1S} = -x_{2H} / (x_{2S} - x_{2H}) > 0$ ,  $b' = \partial b / \partial x_{1S} = 1 / (x_{2S} - x_{2H}) < 0$ .

Thus, after substitutions we obtain that

$$\text{sig } dx_1/dx_{1s} = \text{sig}[x_{2H}-x_{20} + b(x_{10} - x_{1SC})]$$

or from (b)

$$dx_1/dx_{1s} >_< 0 \Leftrightarrow 1 >_< -b(x_{10} - x_{1SC})/(x_{2H} - x_{20}).$$

Thus, if (e) holds, so that  $x_{10} - x_{1SC} < 0$ , then  $dx_1/dx_{1s} > 0$ . If, however, (f) holds, so that  $x_{10} - x_{1SC} > 0$ , then the sign of  $dx_1/dx_{1s}$  depends on the value of  $b$ . Then for very steep contract curves (high values of  $-b$ ), increases in  $x_{1s}$  may reduce the equilibrium value of  $x_1$ . Observe that a steep contract curve implies that the Senate's ideal point changes in the dimension that separates the most the House from the Senate. Finally, observe that assumption (e) implies that the ideal point of the Supreme Court is below the contract curve, while assumption (f) implies that its ideal point is above the contract curve.

We can then state Proposition 1:

Proposition 1: Assume that a) preferences of the House, the Senate and the Supreme Court are represented by circular indifference curves in  $R^2$ ; b) the initial equilibrium is in the interior of the contract curve; then moves in the electorate where either only one house moves or both houses move in the same direction will imply changes in the long run equilibrium which will follow the electorate, unless the change is in only one house, and the dimension that changes is a) one which separates the most the House from the Senate, and b) the initial status quo implied a larger equilibrium value for that dimension than that of the ideal point of the Supreme Court.

The proof of the Proposition is a direct application of Lemmas 1 and 2.

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FIGURE 1

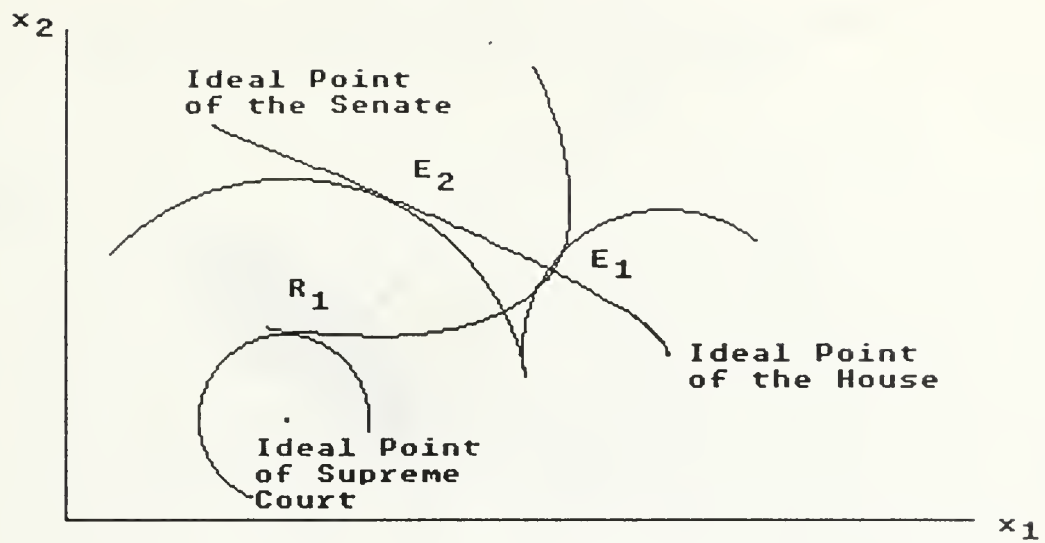


FIGURE 2

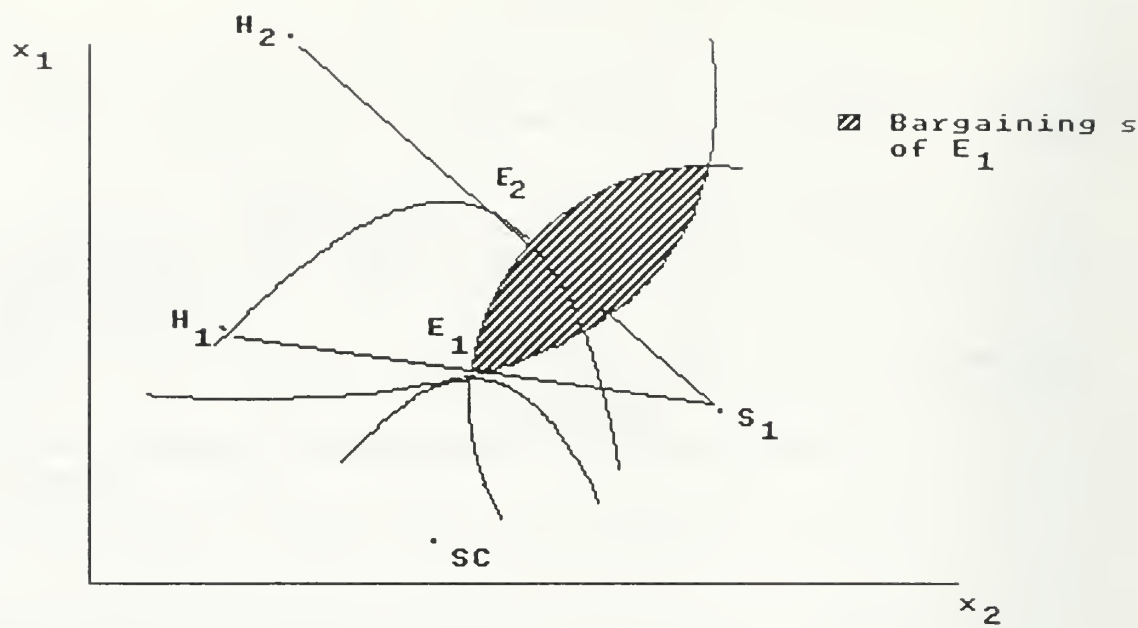


FIGURE 3

LONG RUN EQUILIBRIUM WITH THE SUPREME COURT  
AND WITH NO PRESIDENTIAL VETO POWER

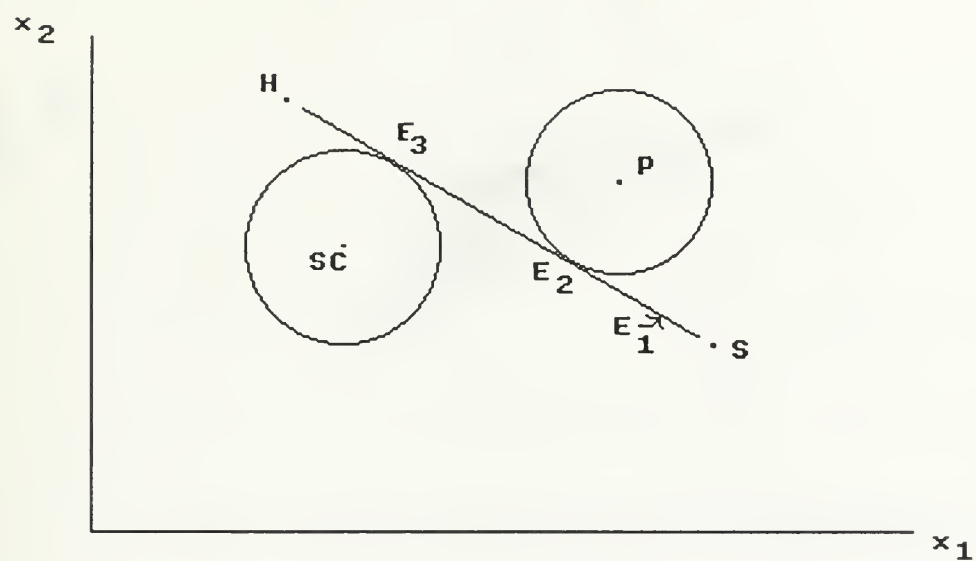




FIGURE 4  
FEASIBLE AND LONG RUN EQUILIBRIA WITH  
PRESIDENTIAL VETO POWER

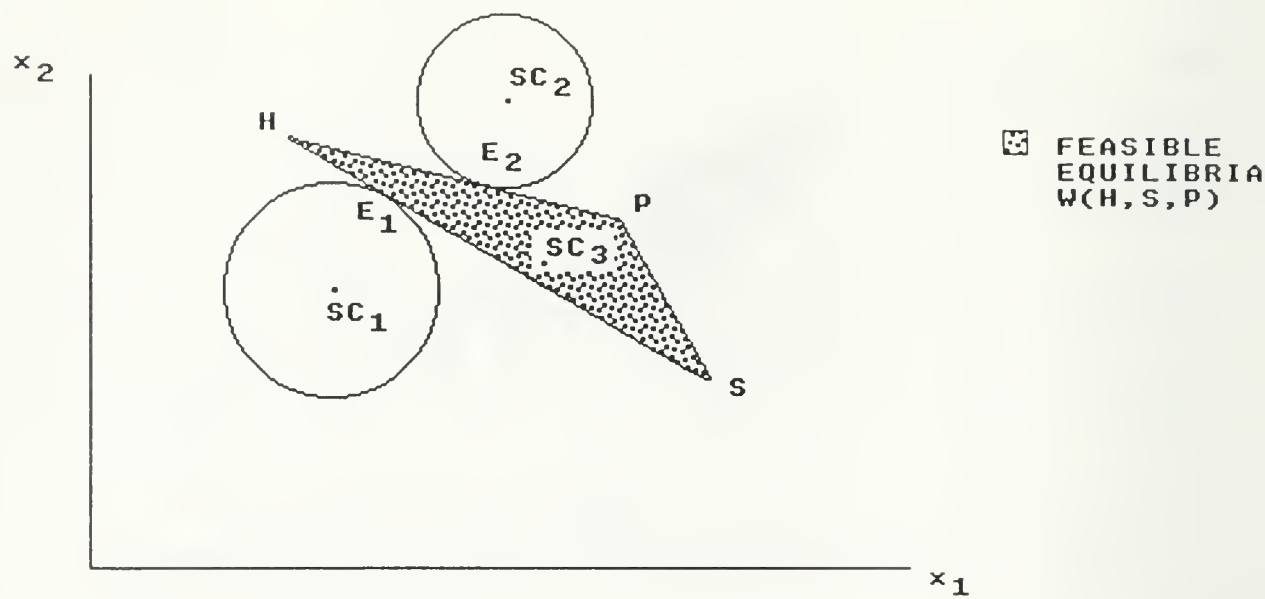
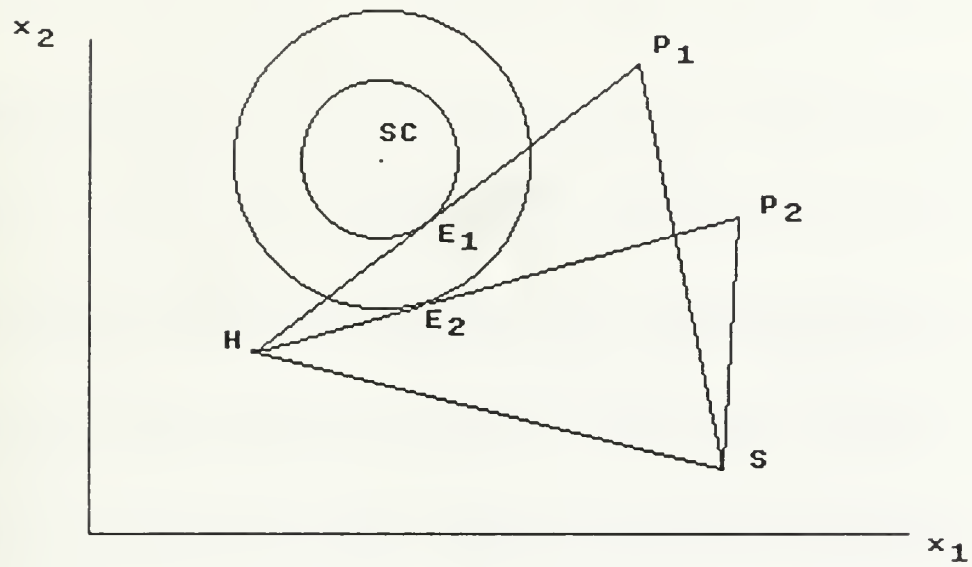


FIGURE 5  
COMPARATIVE STATICS ON  
THE PRESIDENT'S IDEAL POINT



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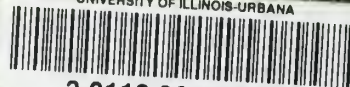


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